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NO. 59034-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re Detention of Curtis Pouncy,

STATE OF WASHINGTON,

Respondent

v.

CURTIS POUNCY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Helen L. Halpert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court admitted findings of fact constituting judicial comments on the evidence.

2. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

3. The trial court erred in rejecting appellant's proposed jury instruction defining "personality disorder" as an element of the case.

4. Appellant was denied his right to jury unanimity on the mental illness element of the case.

Issues Pertaining to Assignment of Error

1. During an involuntary commitment proceeding under Chapter 71.09 RCW, an expert for the defense testified that appellant was not likely to commit future acts of predatory sexual violence. During cross-examination, the state impeached the expert's testimony with findings of fact from another SVP case at which the expert had testified. The trial judge in that case found the expert's methodologies regarding risk assessment were not generally accepted in the scientific community. The expert used the same methodologies in appellant's case. Did introduction of the other court's findings into appellant's commitment trial constitute an improper judicial comment on the evidence?

2. If the findings were not judicial comments, was counsel ineffective in failing to appropriately object to their admission on grounds of relevance, unfair prejudice, hearsay and improper extrinsic evidence?

3. The state's expert witness diagnosed appellant with a "personality disorder." The trial court refused to instruct the jury on the definition of this technical term. Did the trial court abuse its discretion by allowing the jury to speculate on the meaning of "personality disorder" when it constitutes a element the state had to prove before it could involuntarily commit the appellant under Chapter 71.09 RCW?

4. The state's expert testified there was evidence supporting a diagnosis of pedophilia, but not quite strong enough for him to conclude appellant suffered from this abnormality. Was appellant's right to jury unanimity violated where there was insufficient evidence to prove appellant suffered from pedophilia as an alternative means of establishing the mental illness element of the case?

B. STATEMENT OF THE CASE

In 2003, the State filed a petition for Appellant Curtis Pouncy's involuntary civil commitment as a sexually violent predator (SVP) under Chapter 71.09 RCW. CP 1-169. In 1983, Pouncy pled guilty to the second degree rape of 13-year-old Elizabeth Stevens and first degree rape

of Denise Allen. CP 1, 5; 8RP[1] 67-68. In 1997 he was charged with the second degree rape of Angel Harper. CP 3. Pouncy entered an Alford plea to charges of unlawful imprisonment, fourth degree assault, and felony harassment. CP 3; 8RP 137; 9RP 178. In its certification for determination of probable cause, the state alleged the underlying facts of the Harper incident showed these crimes were done with sexual motivation. CP 3, 5-6.

At the commitment trial held before the Honorable Helen L. Halpert, the jury heard evidence of the circumstances surrounding his convictions. 4RP 6-31; 5RP 46-51, 100-11, 128-29; 6RP 3-37; 7RP 37-40, 103-07, 119-24; 11RP 4-21, 31-52; 12RP 146-65; 14RP 8-37; 15RP 10-13. The jury also heard evidence regarding a number of uncharged crimes.[2] Psychiatrist Andy Sands testified Pouncy admitted to seven rapes overall. 6RP 115.

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[1] The verbatim report of proceedings is contained in 18 volumes referenced as follows: 1RP – 9/11/06; 2RP - 9/12/06; 3RP - 9/13/06; 4RP - 9/14/06; 5RP - 9/19/06; 6RP - 9/20/06; 7RP - 9/21/06; 8RP - 9/25/06; 9RP - 9/26/06; 10RP - 9/27/06; 11RP - 9/28/06; 12RP - 10/3/06; 13RP - 10/4/06; 14RP - 10/5/06; 15RP - 10/9/06; 16RP - 10/10/06; 17RP - 10/11/06; 18RP - 10/12/06.

[2] Attempted rape of Karen Berg Arseneault during 1983 burglary (11RP 52-66,103-128; 12RP 6-30); rape of ex-wife, Kathy Pouncy, during marriage (1979-1982) (4RP 103-152; 5RP 146); rape of friend Meri Fagan in 1997 (6RP 130-148).

One uncharged incident is of relevance to an issue on appeal. In 1983, two girls, ages 10 and 11, reported a man tried to lure them into his car while they were walking to Ridgecrest Elementary school. 4RP 35-66; 5RP 5-19, 95-99. An officer who responded to the scene testified at the SVP trial that the girls identified Pouncy as the man who tried to get them into his car. 4RP 42. Rose Infante, a forensic therapist, testified Pouncy told her he had tried to give minors a ride in his car. 12RP 132.

The State offered expert testimony from Dr. Richard Packard, who opined Pouncy suffers from a mental abnormality called "paraphilia not otherwise specified (NOS), non-consent." 8RP 162, 164; 9RP 26. Packard testified the diagnostic criteria for paraphilia are (1) recurrent intense sexually arousing fantasies, sexual urges or behaviors; (2) involving either the suffering or humiliation of one's self or one's partner or children or other nonconsenting persons; (3) occurring over six months. 8RP 167-68. He described paraphilia (nos - nonconsent) as a "paraphilia that involves the fantasies, behaviors of having sexual activity with nonconsenting persons." 8RP 162.

Packard also diagnosed Pouncy with "antisocial personality disorder." 9RP 27, 35, 118. Packard described "personality disorders" as "kind of pervasive, long-lasting, chronic, if you will, ways of thinking, feeling, acting, interacting with others, relationships, interacting with the

society, that are markedly deviant from cultural expectations and norms." 9RP 27.

Packard considered applying a diagnosis of pedophilia to Pouncy. 9RP 24-26. Pedophilia is a type of paraphilia. 8RP 72; 9RP 23. Packard described pedophilia as arousal towards prepubescent children. 9RP 9, 26. He testified there was strong evidence supporting that diagnosis but ultimately concluded Pouncy was not a pedophile. 9RP 24-26, 139.

Finally, Packard opined Pouncy is likely to engage in future acts of predatory sexual violence if not confined in a secure facility. 9RP 118-19.

Pouncy offered expert testimony from Dr. Richard Wollert contradicting Packard's evaluation. 15RP 70-178; 16RP 11-198; 17RP 2-132. In Wollert's opinion, Pouncy did not suffer from a mental abnormality or personality disorder. 15RP 93, 114-15, 120, 162, 169; 16RP 71. Wollert testified Packard's diagnosis of paraphilia (nos - nonconsent) was invalid because the diagnosis itself is not recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM), the criteria for assigning the diagnosis have never been set forth in the DSM, and the reliability of rape-based diagnoses is unacceptably low. 15RP 106-119; 17RP 108. Wollert rejected Packard's antisocial personality disorder diagnosis because Pouncy did not meet the diagnostic criteria.

15RP 119-22, 161-64. Wollert opined Pouncy was not likely to reoffend. 16RP 71-72.

The jury returned a verdict finding Pouncy to be a SVP. CP 1019. The court ordered Pouncy indefinitely committed at the Special Commitment Center. CP 1020-1021. This appeal timely follows. CP 1024-1027.

C. ARGUMENTS

1. THE TRIAL COURT'S ADMISSION OF FINDINGS OF FACT FOR IMPEACHMENT PURPOSES CONSTITUTED JUDICIAL COMMENT ON THE EVIDENCE.

Dr. Wollert testified Pouncy was unlikely to commit predatory acts of sexual violence if not confined in a secure facility. Judge Halpert allowed the state to impeach Wollert by introducing findings of fact from a Yakima SVP case in which Wollert testified. The Yakima judge found his methodologies regarding risk assessment were not generally accepted in the community of mental health professionals who evaluate and assess persons in SVP matters. The admission of those findings in Pouncy's case constituted judicial comment on the evidence.

a. The State Introduced Findings Of Fact From Another Case To Undermine Dr. Wollert's Testimony.

As an element of its case, the state needed to prove beyond a reasonable doubt that Pouncy has a mental abnormality and/or personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16); CP 991 (Instruction 3). On direct examination, Wollert testified about risk of reoffense, the role actuarial tools play in that analysis, and the relative strengths and weaknesses of the various actuarials. 15RP 169-177; 16RP 11-20. Wollert said an actuarial known as the Static 99 was the best predictor of recidivism. 15RP 171; 16RP 21-22. Wollert explained he chose the Static 99 to assess Pouncy in part because the new version incorporated an age variable. 16RP 23-24. According to Wollert, this was of particular importance because "the most robust finding in criminology, the most widely endorsed finding in criminology, is that recidivism rate goes down with age." 16RP 24. Pouncy did not score positive on the age factor because he was 46-years-old, which lowered his overall risk score. 16RP 28-29. Based on the Static 99 results, Wollert concluded Pouncy was not likely to reoffend. 16RP 71-72.

On cross-examination, Wollert testified he used the Bayes theorem to calibrate his risk assessment. 17RP 23-25. He believed "[c]urrent

actuarial tests may be recalibrated so that they more accurately estimate the sexual recidivism rate for offenders of different ages by applying a formula known as Bayes theorem." 17RP 25. Taking into account Pouncy's age and evidence profile, Wollert applied the Bayes theorem to Pouncy's recidivism rate under the Static 99 and concluded Pouncy had a 31 percent risk of reoffense. 17RP 24-25, 27.

Wollert also testified he uses the "Null Hypothesis" in conducting his evaluations, and that he applied it in Pouncy's case. 16RP 155. The Null hypothesis is "equivalent to the principle of innocent till proven guilty." 16RP 155. He said he uses the Null hypothesis as a safeguard against emotionally overreacting to the troubling facts of SVP cases as he formulates his evaluation. 16RP 155-56. When reviewing allegations of misconduct, Wollert starts from the presumption that no offense occurred. 16RP 163-65. He then assesses the evidence supporting the allegation and, if the evidence is sufficient, concludes the offense actually took place. 16RP 163-65. Wollert applied the Null hypothesis to the Angel Harper incident and concluded the evidence was insufficient to conclude Pouncy assaulted her. 16RP 163-65. There was also some indication Wollert used the Null Hypothesis as a "logic model" in a more general sense to mean a presumption that a person does not meet the SVP criteria unless the

evidence is sufficient to show otherwise. 16RP 155, 157-58, 162-63, 165-67; 17RP 105-06.

Wollert had used the Null hypothesis and Bayes theorem in the case of In re Robinson. 16RP 159-61. The trial court in that case entered findings of fact and conclusions of law. 16RP 161. The prosecutor introduced these findings during its cross-examination of Wollert as follows:

> Q. And in the Robinson case -- I'm going to hand you what's been marked Exhibit 156. I want you to look at finding of fact number 19, which is on page four.
> A. Yes.
> Q. And it states, Dr. Wollert's methods of assessing the impact of age on recidivism are generally not accepted in the --
> MS. SCHATTAUER: Objection, Your Honor, foundation.
> THE COURT: On that basis the objection is overruled.
> Q. (BY MS. FLEMMING) In the community of mental health professionals who evaluate and assess persons in SVP matters. This includes his use of Bayes theorem and Null hypothesis, right?
> A. Yes, that's what the judge signed.
> Q. And that's the finding of fact in this case, that your methodologies are not generally accepted in the scientific community, right?
> A. That is what the judge signed.

16RP 160-61.[3]

[3] Exhibit Number 156 itself was not admitted into evidence. The exhibit was more fully described on redirect as a court document titled "Findings of Fact and Conclusions of Law and Order of commitment" in the case of "In Re: The Detention of John Robinson, Respondent." The findings were dated March 3, 2006 and issued from the Yakima County Superior Court. 17RP 103.

The next day, the prosecutor again questioned Wollert about these findings in connection with his use of the Bayes theorem and Null Hypothesis.[4] 17RP 35-36. Pouncy's counsel did not object. The trial judge later commented "[h]ad Ms. Schattauer objected on the issue of relevance to the findings of the Yakima judge, I would have sustained that objection. But it wasn't made." 17RP 140. Before testimony resumed the following morning, the trial court returned to the issue:

> Ms. Schattauer initially had objected to the questioning about the Yakima County findings of fact, but not on a basis that apprised the court of what the real concern is. On thinking about it again, I don't see why we should have in the record evidence that should not be there. I'm inclined to give the following instruction to the jury. I'll let both lawyers comment on it. During the cross-examination of Dr. Wollert, the State asked Dr. Wollert about a finding of fact apparently entered in a case in Yakima County. The question of weight to be given to the testimony of any witness is for this jury to decide, based on all evidence introduced in this case. The jury is not to consider the findings of fact apparently entered in the prior case. Evidence of such finding is stricken from the record.

18RP 4.

Pouncy's counsel did not object to this proposed instruction. 18RP 4. The state did object, first by stating "Dr. Wollert took the stand and

[4] The prosecutor at this time repeated verbatim the finding as follows: "Dr. Wollert's methods of assessing the impact of age on sexual recidivism are not generally accepted in the community of mental health professionals who evaluate and assess persons in SVP matters. This includes his use of Bayes theorem and Null hypothesis." 17RP 36.

asked this jury to take his opinion seriously. The fact that he has previously been testifying -- testified in another county and his testimony did not meet basic standards for admissibility, is relevant. He said he didn't even know about it." 18RP 4-5. The state also expressed its concern that such an instruction "suggests that somehow the State was underhanded in bringing this issue up." 18RP 5. The judge said she was going to give the instruction anyway. 18RP 5.

Later that day, the judge put a sidebar on the record:

> I had indicated at the start of the morning that I would give the parties time to think about their responses to my tentative decision to strike the testimony about the findings of fact entered in Yakima County from the record. The State vehemently objected, the respondent said that there was no objection. In side bar I asked Ms. Schattauer if she was, in fact, affirmatively requesting that I give such an instruction. She said no, that she didn't object, but she wasn't affirmatively requesting it, and I'm going to strike it on my own motion. I am going to request that it not be a subject of closing argument, because I think it is of questionable admissibility.

18RP 37.[5]

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[5] Defense counsel filed a "Declaration and Statement For The Record" on October 16, 2006 in which she related her understanding of what she described as an off-the-record, in-chambers discussion regarding the admissibility of the Yakima findings. CP 1022-23. The trial judge asked her if she had any objections to the admission of the findings. Assuming the judge had not changed her mind, she deferred to the court. According to Schattauer, the trial judge commented while walking out of chambers that "she had decided to admit Exhibit 156." "This in-chambers, off-the-record exchange was then placed on the record by the Court." Given that Judge Halpert placed on the record that she was going to strike the

The trial judge later reminded the state not to use the Yakima findings in closing argument. 18RP 48. As it turns out, the trial judge did not in fact ever give the instruction she had earlier proposed, nor did she otherwise inform the jury that the Yakima findings were stricken and not to be considered as evidence. The record does not show why.

b. The Findings Constituted a Judicial Comment On Dr. Wollert's Credibility And The Validity Of His Methodologies Regarding Contested Elements In The Case.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Here, the state introduced findings of fact made by another judge in another case for the express purpose of refuting the reliability of Wollert's testimony in this case. 18RP 4-5. In both cases, Wollert relied on methods of assessing the impact of age on recidivism. In this case,

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findings, it appears Schattauer was mistaken about the judge's position on the matter.

Wollert placed special emphasis on Pouncy's age in coming to his conclusion that Pouncy was not likely to reoffend. But the judge in the Yakima case found his methods, including his use of the Bayes theorem and Null Hypothesis, were not generally accepted in the scientific community. Wollert relied on those specific methods in reaching his opinion that Pouncy did not meet the SVP criteria. Those findings, placed in front of the jury in Pouncy's case, constituted judicial comments on the evidence.

A judge is not permitted to comment on a witness's credibility. Lane, 125 Wn.2d at 837-38. Neither may a judge criticize the evidence, or assert that a fact is proven by means of such criticism. Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969). But that is precisely what happened here. A judge who weighs and evaluates evidence for the jury runs afoul of "the well-supported principle that '[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.'" State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (citation omitted).

A judicial comment on the evidence does not cease to be one simply because the comment comes from a judge that is not presiding over

the trial.[6] If anything, the admission of the Yakima findings constituted a judicial comment of double magnitude. From the jury's perspective, Judge Halpert, by overruling Pouncy's objection to admission of the findings and allowing the jury to consider them, ratified their validity. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (trial judge's denial of defense counsel's objection lent aura of legitimacy to state's otherwise improper argument).

Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Pouncy's claim should thus be reviewed even though his trial counsel may have failed to raise an appropriate objection to the admission of this judicial comment evidence.

c. Prejudice Resulted Because The Judicial Comment Referred To A Contested Element Of The Case.

Once it has been demonstrated a judge's remarks constitute a comment on the evidence, a reviewing court will presume the comment was prejudicial. Lane, 125 Wn.2d at 838-39. This presumption exists because the very purpose of prohibiting judicial comments is to prevent the trial judge's opinion from influencing the jury. Id. at 838. Our Supreme Court has explained:

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[6] This appears to be an issue of first impression.

> The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Id. (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)).

In a SVP proceeding, "psychiatric testimony is central to the ultimate question" of whether a person suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence. In re Pers. Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993); In re Det. of Twining, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995). Determining whether a particular person in a SVP case possesses a mental abnormality as defined by RCW 71.09.020(8) "is based upon the complicated science of human psychology and is beyond the ken of the average juror." In Re Det. of Bedker, 134 Wn. App. 775, 146 P.3d 442, 444 (2006). A diagnosis of a mental abnormality or personality disorder, "when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP." In re Det. of Thorell, 149 Wn.2d 724, 761-62, 72 P.3d 708

(2003); see also Young, 122 Wn.2d at 32 n.9 (in addressing quantum of proof necessary to meet dangerousness prong of SVP statute, stressing testimony came from licensed mental health professionals familiar with petitioners' past conduct and current mental profiles).

This case involved "a classic battle of the experts, a battle in which the jury must decide the victor." Intalco Aluminum v. Dept. of Labor and Industries, 66 Wn. App. 644, 662, 833 P.2d 390 (1992) (in which one party's medical expert challenged the theories on which the opposing party's experts based their conclusions). Packard testified Pouncy had a mental abnormality and personality disorder that made him likely to commit predatory acts of sexual violence in the future. Wollert reached the opposite conclusion. Under these circumstances, it is likely that the improper judicial comment, which demolished the truth value of Wollert's testimony, unduly influenced the jury as it weighed the strength of dueling expert opinions. Reversal is required.

2. IF THE FINDINGS OF FACT DO NOT QUALIFY AS JUDICIAL COMMENTS, THEN COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE AN APPROPRIATE EVIDENTIARY OBJECTION TO THEIR ADMISSION.

In the event this Court holds the Yakima findings are not judicial comments, reversal is still required because counsel was ineffective in failing to prevent their admission under the rules of evidence. See State v.

Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance and justifies examination of substantive issues on appeal).

Effective assistance of counsel is necessary to ensure a fair and impartial trial. Id., 94 Wn.2d at 849. In order to show ineffective assistance of counsel, Pouncy must show (1) that his attorney's performance was deficient and (2) that he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Although SVP proceedings are civil in nature, defendants have the right to counsel and courts apply the Strickland standard to determine whether counsel was ineffective. RCW 71.09.050(1); In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007).

a. Counsel Was Deficient In Failing To Set Forth A Correct Objection To The Inadmissible Evidence.

Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Counsel's performance was deficient because she failed to make an appropriate objection to the admission of the findings. Simply objecting on the generic ground of "foundation" was insufficient. 16RP 161. As the trial judge stated, "[h]ad Ms. Schattauer objected on the issue of relevance to

the findings of the Yakima judge, I would have sustained that objection. But it wasn't made." 17RP 140.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Irrelevant evidence is inadmissible. ER 402. The findings made by the Yakima judge were irrelevant. Evidence that a different trier of fact found Wollert's methodologies invalid had no probative force because Pouncy's jury was "the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." Fernandez-Medina,141 Wn.2d at 460.

Legitimate trial strategy or tactics cannot be the basis for an ineffectiveness of counsel claim. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Here, counsel's objection on an inappropriate ground was not the product of legitimate strategy: she was trying to keep the evidence out. No legitimate tactic could justify admission of a judicial finding that Pouncy's expert witness used bogus methodologies.

Even assuming the evidence was relevant, counsel's performance would still be deficient for failing to object on grounds of ER 403. Under ER 403, evidence will not be admitted when its probative value is substantially outweighed by the danger of unfair prejudice. Generally

speaking, evidence is unfairly prejudicial when it is of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (citation and internal quotation marks omitted); see also State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000) (evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process.").

Here, the state presented the Yakima findings in order to impress upon the jury that judicial authority had already determined Wollert's methodologies to be unsound. See Nipper v. Snipes, 7 F.3d 415, 418 (4th Cir. 1993) (judicial findings of fact "present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.") (citation omitted). Those findings had no legitimate probative force and skewed the truth-finding process because the jury, not the Yakima judge, had the responsibility of determining the truth and weight of Wollert's testimony.

Counsel was also ineffective in failing to object to the findings as hearsay. "Hearsay" is an oral or written assertion, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is

inadmissible unless it falls within certain exceptions. ER 802. Hearsay may not be incorporated into questions asked for impeachment purposes. Washington Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 687-88, 724, 724 P.2d 997 P.2d 997 (1986). Here, the Yakima court's findings are inadmissible hearsay because they are written assertions made by the nontestifying judge offered to prove that Wollert's methodologies were not accepted in the scientific community. No hearsay exception applies. "In excluding judgments as hearsay, the courts have undoubtedly been influenced by the fact that jurors often attribute more importance to judgments than is warranted, and often regard judgments as conclusive proof despite instructions to the contrary." 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.75 (4th ed. 2006).

Finally, the findings were inadmissible under ER 608(b), which provides specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, may not be proved by extrinsic evidence. State v. Barnes, 54 Wn. App. 536, 540, 774 P.2d 547 (1989) (cross-examiner attempting to impeach must "take the answer" of the witness without resort to extrinsic evidence). Thus, counsel was also deficient in failing to object on the ground that the findings constituted inadmissible extrinsic evidence.

b. Pouncy Was Prejudiced By Judicial Findings That Wollert's Methods Were Unsound.

To show prejudice, there must be a reasonable probability that but for counsel's performance, the result would have been different. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The defendant need not show that counsel's deficient performance more likely than not altered the outcome. Id. at 693.

In this case, we know Judge Halpert would have excluded the findings had an appropriate objection been made. 17RP 140. Further, the same concerns of prejudice behind judicial comments remain operative in the context of irrelevant and unfairly prejudicial evidence authored by a judge. Judicial findings of fact create a serious danger of unfair prejudice, as juries are likely to give disproportionate weight to such findings because of the imprimatur that has been stamped upon them by the judicial system. Nipper, 7 F.3d at 418 (despite limiting instruction, hearsay findings made by judge in different case that were read to jury required reversal); see also Greycas, Inc. v. Proud, 826 F.2d 1560, 1567 (7th Cir.1987) ("A practical reason for denying [judgments] evidentiary effect is . . . the difficulty of weighing a judgment, considered as evidence, against whatever contrary evidence a party to the current suit might want

to present. The difficulty must be especially great for a jury, which is apt to give exaggerated weight to a judgment.").

The subject matter of the Yakima findings amplified the prejudicial effect. Dr. Packard, testifying as the state's expert witness, criticized Wollert's methodologies. 9RP 82-88, 96-100. The Yakima findings effectively constituted an additional expert opinion on the validity of Wollert's methodologies - an opinion cloaked in the mantle of judicial authority. "Unlike the scientific community's process of peer review, there is no practical way for a scientist to defend against a judge's assessments of credibility," while a jury "may give exaggerated weight to a judge's supposed expertise on such matters." Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 141 F. Supp .2d 320, 323, 324 (E.D.N.Y. 2001)(excluding factual findings of a different judge offered to impeach plaintiff's expert); see Johnson v. Yellow Freight System, Inc., 734 F.2d 1304, 1309 (8th Cir. 1984) (in employment discrimination case, admission of government agency report determining reasonable cause to believe employer had discriminated would have been improper because it was same as admitting opinion of expert witness as to what conclusions the jury should draw).

In weighing the validity of Wollert's testimony, upon which Pouncy's fate in large measure rested, the jury may have been improperly

influenced by findings of fact carrying the weight of judicial authority. This Court cannot be confident they did not. Reversal is required.

3. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF PERSONALITY DISORDER.

The court refused counsel's proposed instruction defining "personality disorder," an element of the case that the state needed to prove beyond a reasonable doubt. In so doing, the court committed reversible error because the jury was left to invent its own meaning of the term. Division Three rejected a similar argument in Twining, 77 Wn. App. at 895-96. For reasons discussed more fully below, this Court should decline to follow Twining and hold that it is error to refuse to define the term "personality disorder" when requested to do so.

a. The Trial Court Rejected Counsel's Proposed Instruction Defining "Personality Disorder" Without Explanation.

The state needed to prove Pouncy suffers from a mental abnormality and/or a personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 991 (Instruction 3); RCW 71.09.020(16). Packard diagnosed Pouncy with an "antisocial personality disorder." 9RP 27, 35, 118. Wollert opined Pouncy did not suffer from that disorder. 15RP 120, 162.

Pouncy's counsel proposed an instruction defining the term "personality disorder" for the jury, which read:

> A Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

CP 730, 931.

In support, counsel cited the DSM IV-R and Twining. CP 730, 931. The state did not propose an instruction defining the term. Prior to closing argument, the trial court asked for objections or exceptions to the jury instructions. 18RP 38. Pouncy's counsel took exception to the court's failure to include a number of her proposed instructions. 18RP 39-45. In so doing, she reiterated her desire to have the term "personality disorder' defined for the jury. 18RP 43. The state responded "[m]any of the requested instructions by the defense result in a comment on the evidence" but made no specific reference to the personality disorder instruction. 18RP 45. The court rejected the proposed instructions, but did not say why a definition of "personality disorder" was unwarranted. 18RP 45-46. The court did say "[t]he other issues we have discussed many times, have been the subject of several written orders at this point. I don't see that there's any need to review the court's rulings in that regard." 18RP 46. A

review of the record, however does not show any discussion or written order regarding the proposed personality disorder instruction.

b. "Personality Disorder" Is A Technical Term That Needed To Be Defined For The Jury.

"Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). "The technical term rule attempts to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Applying that same logic to SVP cases, the rule ensures individuals are not involuntarily committed by a jury that misunderstands whether someone meets the definition of a SVP.

Whether words used in an instruction require definition is a matter of discretion to be exercised by the trial judge. State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "[D]iscretion does not mean immunity from accountability." Carson, 123 Wn.2d at 226. "The range of discretionary choices is a question of law and the judge abuses his or her discretion if

the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Questions of law are reviewed de novo. Hanson v. City of Snohomish, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

In Twining, both parties offered instructions defining personality disorder.[7] Twining, 77 Wn. App. 895. After considering these definitions, the trial court decided to exclude an instruction on that term, leaving it to the parties to argue their definitions in closing. In a remarkably terse analysis, Division Three held the court did not err in refusing to give the instruction. The court found no abuse of discretion but failed to explain why. Id. Twining cited State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984) for the proposition that undefined terms may lead the jury to supply its own definition rather than an objective legal standard. The Twining court distinguished that case on the ground that Allen "was talking about statutorily defined terms with specific legal definitions," while "the definition of personality disorder is not so defined." 77 Wn. App. at 895-96.

Twining grasped the outward form of Allen but ignored its animating rationale. Allen held the trial court erred in failing to give an instruction defining the term "intent" for an attempted second degree burglary charge because "intent" was a technical term. Allen, 101 Wn.2d

[7] The opinion does not give the wording of either proposed instruction.

at 361. The legal meaning of intent, as defined by statute, differed from its commonly understood meaning. Id. at 360. The basis for its holding was that the jury, faced with terms that did not comport with common understanding, should not be "forced to find a common denominator among each member's individual understanding of these terms and to determine on its own just what was their meaning." Id. at 362. "Although the jury may be able to hammer out a definition for intent and knowledge among themselves," reversal was required because "[t]here is no way to ascertain whether they used the proper, statutory definitions." Id. Pouncy's jury was faced with the same basic dilemma of having to hammer out a definition of "personality disorder" among themselves, and there is no way to determine they agreed upon a proper definition of the term in the absence of sufficient guidance from the trial court.

The court's underlying assumption in Twining seemed to be that only a statutorily defined term could qualify as a technical term but failed to explain why this is so. Whether a term is technical does not turn on whether the term is defined by statute. A term is "technical" when it has a meaning that differs from common usage. Brown, 132 Wn.2d at 611. The term "personality disorder" has no common usage.

Our Supreme Court recognizes "personality order" is a term of art employed by specialists in the psychiatric field. In Young, petitioners

argued various terms in the SVP statute were unconstitutionally vague. Young, 122 Wn.2d at 49. The Court observed due process required "clear standards to prevent arbitrary enforcement by those charged with administering the applicable statutes." Id. The Court held the SVP statute was not unconstitutionally vague because the term "mental abnormality" was defined by statute. In addition, the Court cited to the DSM in support of its position that the term "personality disorder" has "a well-accepted psychological meaning." Id. at 50. The "definitions" of these two terms provided the fact finder sufficient guidance as it sought to properly apply those standards to the particular set of facts before it. Id.

Here, however, the jury was never provided with a definition of personality disorder, and thus lacked guidance regarding how to apply that legal standard to the facts of Pouncy's case. "Jury instructions must more than adequately convey the law. They must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. The trial court's failure to define the term "personality disorder" permitted the

jury to use an erroneous interpretation of that term as it determined whether Pouncy met the SVP criteria.

The laissez-faire approach employed in Twining allows the jury to define the law for itself. But jurors apply the law, they do not declare it. See State v. Tang, 75 Wn. App. 473, 476, 878 P.2d 487 (1994) ("Jury instructions are meant to instruct the jury on what law to apply to the facts it finds."). Because the role of the trial court is to explain the law of the case to the jury through jury instructions, "[t]he trial court may not delegate to the jury the task of determining the law." State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992).

Just as the trial court cannot delegate the task of determining the law to the jury, neither may it delegate that task to the attorneys. Our Supreme Court has observed "[t]he jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). In making that observation, the Court in Aumick pointed out the trial court in that case properly instructed the jury that it should "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." Id. Pouncy's jury was given the same instruction. CP 988 (Instruction 1). This Court likewise recognizes "[i]nstructions should tell the jury in clear terms what the law is. Jurors should not have to speculate about it, nor

should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is." State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995). Allowing the parties to argue their definition of an element of the case in closing, as they did in Twining, is no solution to the problem of undefined technical terms and cannot be squared with existing case law.

Although the term "personality disorder" derives from the psychiatric field, it would be improper to allow experts in that field to define that term for the jury as a matter of law. The court "shall declare the law." Wash. Const. art. IV, § 16. "For an expert to testify to the jury on the law usurps the role of the trial judge." State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." Id. (citation and internal quotation marks omitted). "A contrary rule would confuse the jury because each party would find an expert who would state the law in the light most favorable to its position." Id. (citation and internal quotation marks omitted). While an expert may testify as to matters of law and express an opinion which embraces an ultimate issue of fact, under no circumstances is such a witness allowed to proffer legal conclusions under

the guise of expert testimony or testify that a particular law applies to the case. State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002); Stenger v. State, 104 Wn. App. 393, 407, 16 P.3d 655 (2001).

Olmedo provides a useful illustration of the perils of allowing the experts to define a technical term for the jury. The defendants in that case were charged with unlawful storage of anhydrous ammonia. Olmedo, 112 Wn. App. at 529. The "to convict" instruction on this charge defined the elements as knowing possession of anhydrous ammonia in a container (a) not approved by the United States department of transportation to hold anhydrous ammonia, or (b) not constructed to meet state and federal industrial health and safety standards for holding anhydrous ammonia. Id. The court refused Olmedo's request to further define a DOT approved tank or identify the applicable state and federal industrial health and safety standards. Id. at 529-30. The trial court justified its refusal on the fact that Beckman, one of the state's witnesses, testified he was familiar with approved tanks and that they did not meet legal requirements as he understood them. Id. at 534. The court of appeals held it was error not to give defining instructions because the witness's testimony was "merely evidentiary in nature, not conclusive; the jury could disregard or discredit it. By relying upon Mr. Beckman's testimony regarding the legality of the propane tanks as a substitute for the proper legal definitions, the trial court

both relieved the State of proving exactly what were the DOT requirements and implicitly accepted Mr. Beckman's testimony as fact." Id. at 534, 536. The legal definition of a DOT approved container was not a matter of common knowledge. Id. at 535. "Because the jury was never instructed as to the legal definition of an approved container, they were prevented from questioning Mr. Beckman's testimony." Id. at 534.

Similarly, the jury in a SVP case should not be held captive by the expert's definitions of what constitutes a personality disorder. Whether an individual meets the definition should be based on a uniform standard handed down by the judge rather than the whimsy of a witness.

The error was not harmless because Pouncy's theory of the case was that he has neither a mental abnormality or a personality disorder that makes him likely to commit predatory acts of sexual violence. Because the jury was free to disregard Packard's expert testimony that Pouncy had a mental abnormality,[8] there is no way of knowing the jury did not find Pouncy to be an SVP on the sole basis of having an undefined personality disorder. Reversal is required when there is no way to ascertain the jury considered a proper definition of a technical element of the crime in reaching its verdict. Allen, 101 Wn.2d at 362.

[8] CP 1010 (Instruction 22).

4. POUNCY'S RIGHT TO JURY UNANIMITY WAS VIOLATED BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH ALTERNATE MEANS OF PROVING THE MENTAL ILLNESS ELEMENT.

There was insufficient evidence to support a finding of pedophilia as the an alternative means by which the mental illness element of the case was proven. As a result, the trial court needed to either instruct the jury that it must reach unanimous agreement as to which mental abnormality he supposedly suffered or issue a special verdict form specifying the abnormality relied upon. Reversal is required because in the absence of these measures, there was no particularized expression of jury unanimity on each of the alternative means of proving the mental illness element.

a. Unanimity Rules Apply in SVP Cases.

Although SVP commitment proceedings are civil in nature, a defendant in such a proceeding is entitled to due process protections that include a unanimous jury verdict. In re Det. of Halgren, 156 Wn.2d 795, 807-08, 132 P.3d 714 (2006). Because the ultimate due process concern is in ensuring the jury unanimously agrees on the basis for confinement, our Supreme Court has held unanimity rules applicable to criminal cases are also applicable to SVP cases. Halgren, 156 Wn.2d at 809. In criminal cases, the right to a unanimous jury verdict includes the right to a particularized expression of jury unanimity on the means by which the

defendant committed the crime when there is insufficient evidence to support one of the means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 717, 881 P.2d 231 (1994). In SVP cases, the right to a unanimous jury verdict includes the right to jury unanimity on the means by which the mental illness element of the case is proven. Halgren, 156 Wn.2d at 810.

To commit someone as a sexually violent predator, the state must prove that the person suffers from either a "mental abnormality" or a "personality disorder." Id. at 809, 812; RCW 71.09.020(16), 71.09.060(1). In Halgren, the jury heard evidence from the state's expert that the defendant suffered from both a "mental abnormality" and a "personality disorder." Id. at 800. The Court held "mental abnormality" and "personality disorder" are alternative means for making the SVP determination. Id. at 810. The Court found no error in failing to give a jury unanimity instruction in that case because "the evidence presented by the State was sufficient for a reasonable jury to conclude that Halgren had both a mental abnormality and a personality disorder beyond a reasonable doubt." Id.

In reaching its determination that the mental illness element had been satisfied, the jury here was faced with three alternatives: (1) a personality disorder (antisocial personality disorder); (2) the mental abnormality of paraphilia (nos - nonconsent); and/or (3) the mental

abnormality of pedophilia. Pouncy acknowledges substantial evidence supports a finding of the abnormality of paraphilia (nos - nonconsent). Pouncy also acknowledges there is substantial evidence to support a finding of "personality disorder" as that term is defined by the DSM. However, substantial evidence does not support a finding of pedophilia.

b. The Jury Heard Evidence Of Pedophilia at Trial.

Packard considered the diagnosis of pedophilia. 9RP 23. Early in direct examination, Packard testified at length about Pouncy's attempts to lure two young girls into his car outside Ridgecrest elementary school. 8RP 64-65, 69-73. This incident, in conjunction with other evidence involving sexual contact with children, was "potentially significant" because it raised concerns about pedophilia. 8RP 72. During Packard's face-to-face evaluation, Pouncy denied luring the children. 8RP 73. Packard said Pouncy had never been treated for pedophilia or, as the prosecutor put it, "for the offense cycle of trying to get a 10- and 11-year-old girl into his car." 8RP 74.

In examining Packard, the prosecutor later returned to the pedophilia issue:

> Q. Now, was there evidence in the record to support a diagnosis of pedophilia, and if so, can you overview that for the jury, please?
> A. Sure, certainly evidence indicating that it's reasonable to consider the possibility. And that starts really when Mr.

Pouncy was 12. He admitted fondling his eight-year-old niece. At the age of 11 or 12, Mr. Pouncy admitted having engaged a nine-year-old in mutual exposure. One of the things I know personally from my clinical experience with adolescent sex offenders, whom I evaluated and treated for many years, is that it's not unusual that the onset of arousal towards prepubescent kids actually begins in early adolescence for many of these people, and then over the course of the next several years becomes more fixed, and that the paraphilia then develops pretty strongly. So this was, obviously, information that concerned me. And then as an adult, Mr. Pouncy forced a 13-year-old girl to engage in oral and non-anal intercourse. Kathy Pouncy, Mr. Pouncy's first wife, she described Mr. Pouncy as trying to touch her 11-or 12-year-old sister and trying to get her alone, and it left Kathy Pouncy with the impression that Mr. Pouncy was trying to have sexual contact with her young sister. Mr. Pouncy's been described as attempting to approach two 10-year-olds, approximate, girls, on the way to school, and trying to get them into his car. Although he denies this behavior when I interviewed him, there's also information in a polygraph that he may have disclosed that. In previous evaluations Mr. Pouncy's been characterized as having moderately severe interests in child molestations, and those have some specific recommendations, that Mr. Pouncy should have no contact with minors. Previous treatment people and evaluation people recommended that. We also have his endorsement on some of the psychological testing, like the multiphasic sex inventory, in which he's described having sexual contact with children. And the plethysmograph assessment Mr. Pouncy showed measurable levels of arousal to, both, male and female child stimuli. So this is information that is pretty strongly suggestive that pedophilia may also be a problem for him.

Q. Now, ultimately did you diagnose Mr. Pouncy with pedophilia?

A. No, I did not conclude that Mr. Pouncy definitely has pedophilia.

Q. Was that because there was not sufficient evidence to support that diagnosis in the record?

> A. Well, there's strong evidence, and I think it certainly worthy of continuing exploration in potential treatment, obviously, and it should be considered, but there are issues. One of the things about pedophilia is it's the arousal towards prepubescent children. Now, 13-year-olds and 12 year-olds can be either in puberty or not. It's that age when it has an onset, but people change, and there's a lot of variability about that. So I didn't construe it as firmly enough evidence to actually conclude it.

9RP 24-26.[9]

On cross-examination, Packard reiterated he suspected Pouncy could have a definition of pedophilia because the "features in his history are such that it would cause me to be concerned about it." 9RP 139. The prosecutor cross-examined Wollert on pedophilia, pressing him to admit Packard had included evidence supporting a pedophilia diagnosis in his report, but that Wollert had not included a discussion of pedophilia in his own. 16RP 132-35.

In closing argument, the prosecutor raised the pedophilia issue again:

> Now Dr. Packard laid out for you the evidence that supported a diagnosis of paraphilia NOS non-consent, and he also laid out for you the evidence in the record that

[9] The jury also heard substantive evidence of incidents involving Pouncy's contact with children. Such evidence included the Ridgecrest incident (4RP 35-66; 5RP 5-19, 95-99; 12RP 132); the rape of 13-year -old Stevens (4RP 6-31; 5RP 46-49, 100-11, 128-29); "two rapes of minor females" (6RP 115); fondling his eight-year-old niece (5RP 53-54; 8RP 76); sexual contact with a nine-year-old neighbor girl (5RP 54; 8RP 76-77); and engaging his four-year-old niece in a game of show and tell (5RP 53).

supports a diagnosis of pedophilia, and he concluded that there was not sufficient evidence of pedophilia. There was some concerning evidence that Mr. Pouncy is attracted to children, but not enough. Here there is enough.

18RP 68.

Pouncy's counsel responded in her closing as follows:

Pedophilia, I've gotta tell you, this is where I do get upset with Dr. Packard, how much more frightening can anything be than to say a person could be released, could be an undiagnosed pedophile, and then if you release him you're going to put him out on the streets and our children are going to be in danger? Dr. Wollert, agree with him or disagree with him on the issue of paraphilia, went through each one of the criteria in the DSM for a pedophile. Dr. Packard relies on the fact that Mr. Pouncy molested his eight-year-old niece when he was 12 years old. A 12-year-old can't be a pedophile. Dr. Packard relies on the fact that Mr. Pouncy, at the age of 11 or 12, had sex with, molested a nine-year-old neighbor. Again, it does not fit the criteria. With respect to the 13-year-old, whom Mr. Pouncy raped, Mr. Pouncy calls himself a pedophile, but that was one instance. And Mr. Pouncy calls himself a pedophile because that's what he learned in treatment he has to call himself. Shame on Dr. Packard.

18RP 131-32.

In rebuttal, the state argued:

Now, the last thing I want to mention is this comment about Dr. Packard and shame on him for talking about pedophilia. I think the word that counsel used was this frightening word, frightening word, "pedophilia." This isn't some artificial world that we're talking about, that Mr. Pouncy's going to live in, where we don't use words that apply because Mr. Pouncy's lawyer is offended by them. This is the real world that we're talking about letting this man walk around in, and Dr. Packard appropriately, because it's his

> job, went through and identified what evidence in the record supports this diagnosis, and there was some. He molested his niece. He molested a neighbor girl. He tried to get two little girls into his car, and he raped a 13 year-year-old girl. That's not even mentioning all of them. And he concluded, he concluded that there wasn't enough evidence for pedophilia. But it's a concern. Why? Because he is doing a sexually violent predator evaluation, where you're considering Mr. Pouncy's risk of future sexual recidivism, including offenses involving children. I would agree pedophilia is frightening and it should be considered as frightening when we're considering this man out in our community.

18RP 146.

c. The Evidence Was Insufficient To Prove Pedophilia Was the Mental Abnormality.

As set forth above, the jury heard evidence of pedophilia. Packard testified there was strong evidence to supported that diagnosis. 9RP 26. But Packard "didn't construe it as firmly enough evidence to actually conclude" Pouncy was a pedophile and for this reason declined to go so far as to diagnose Pouncy with pedophilia. 9RP 26. As explained below, there was insufficient evidence to prove Pouncy had pedophilia as a matter of law due to the lack of diagnosis.

"In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternate means." State v. Kitchen, 110 Wn.2d

403, 410, 756 P.2d 105 (1988). "If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Ortega-Martinez, 124 Wn.2d at 707-08. Reversal is required where substantial evidence does not support each of the alternative means. Halgren, 156 Wn.2d at 810-11. The substantial evidence test[10] is satisfied if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." Halgren, 156 Wn.2d at 811 (quoting Kitchen, 110 Wn.2d at 411).

"In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson." Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001). "Medical facts must be proved by expert testimony unless they are observable by laypersons and describable without medical training." Id. As mentioned, determining whether a person in a SVP case possesses a mental abnormality "is based upon the complicated science of human

[10] In conducting alternative means analyses, the terms "substantial evidence" and "sufficient evidence" are used interchangeably. See Ortega-Martinez, 124 Wn.2d at 708 (sufficient evidence). Whatever the label, the test for determining the necessary quantum of proof is the same.

psychology and is beyond the ken of the average juror." Bedker, 146 P.3d at 444. Expert psychiatric testimony is therefore necessary to provide sufficient evidence of mental abnormality. See Thorell, 149 Wn.2d at 761-62 (testimony of state's experts, by providing diagnosis of mental abnormality and linking abnormality to serious lack of control, gave jury sufficient evidence to commit person as SVP); In re Det. of A.S., 138 Wn.2d 898, 915 n.7, 982 P.2d 1156 (1999) (physician testimony necessary to diagnose person with "mental abnormality" in involuntary commitment proceeding under Chapter 71.05 RCW).

Here, there was insufficient evidence that Pouncy suffered from pedophilia because Packard did not make that diagnosis.

d. It Cannot Be Determined That The Verdict Rested Solely On the Alternative Mental Disorders Supported By Substantial Evidence.

If one or more of the alternative means is not supported by substantial evidence and there is only a general verdict, the verdict must be reversed unless this Court can determine that it was based on only one of the alternative means and that substantial evidence supported that alternative means. State v. Nicholson, 119 Wn. App. 855, 860, 863, 84 P.3d 877 (2003), overruled on other grounds, State v. Smith, __Wn.2d __, 154 P.3d 873, 877 (2007). Here, the jury was not bound by Packard's opinion that there was not enough evidence to make a diagnosis of

pedophilia, nor was it bound by the prosecutor's remark about the sufficiency of evidence on the issue. Regarding expert testimony, the jury was instructed:

> A witness who has special training, education, or experience in a particular science, profession, or calling may be allowed to express an opinion in addition to giving testimony as to facts. *You are not bound, however, by such an opinion.*

CP 1010 (Instruction 22) (emphasis added).

From the jurors' perspective, as measured from the instructions given in this case, there was nothing to stop them from coming to their own conclusion as to whether Pouncy had pedophilia based on their own assessment of the strength of the supporting evidence. The jury was further instructed "[i]n deciding this case, you must consider all of the evidence that I have admitted." CP 987 (Instruction 1). The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). The jury in this case is therefore presumed to have considered evidence of pedophilia in reaching their verdict. Additional instructions bulwark this point. The jury was told "[i]t is your duty to decide the facts in this case based upon the evidence presented to you during this trial . . . *You must apply the law that I give you to the facts that you decide have been proved*, and in this way decide the case." CP 987 (Instruction 1) (emphasis added). The jury was further instructed "[y]ou

are also the sole judges of the value or weight to be given to the testimony of each witness." CP 987 (Instruction 1).

The jury was given free reign to decide for itself whether the evidence was strong enough to prove Pouncy had pedophilia. In the absence of an expert diagnosis, the evidence was insufficient to prove pedophilia as a matter of law. But the jury was not so instructed. On the contrary, the instructions commanded the jury to decide for itself the facts of the case and to apply the law to those facts. Pouncy's right to jury unanimity was therefore violated because one or more jurors may have concluded Pouncy only had pedophilia while others could have concluded Pouncy had paraphilia (nos - nonconsent) or a personality disorder.

In closing argument, the prosecutor told the jury there was insufficient evidence of pedophilia. 18RP 68. But the jury was not bound by that pronouncement either. The jury was instructed:

> As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

CP 988 (Instruction 1).

The finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.

Fernandez-Medina, 141 Wn.2d at 460. The jury, not the prosecutor, remained the ultimate arbiter of what facts had been proved.

"An appellate court must be able to determine from the record that jury unanimity has been preserved." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). This Court is unable to make that determination in this case. The "to commit" instruction was all-inclusive as to the mental illness to be found. CP 991 (Instruction 3). There was no jury unanimity instruction on alternative means or a special verdict specifying which of the alternative means the jury found to prove the mental illness element. CP 1019. The jury was instructed to consider all the evidence in reaching its verdict, and further instructed that it was not bound by the expert's opinion or by remarks made by the prosecutor. Under these circumstances, Pouncy's constitutional right to a unanimous jury verdict was violated because there was no particularized expression of unanimity as to which mental abnormality he supposedly suffered. Although the unanimity issue was not raised at trial, this Court may address it for the first time on appeal because an error involving jury unanimity is an issue of constitutional magnitude. State v. Gitchel, 41 Wn. App. 820, 822, 706 P.2d 1091 (1985); see also State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (failure to give a proper unanimity instruction may be raised for the first time on appeal).

D. CONCLUSION

For the reasons stated, this Court should reverse the verdict.

DATED this 2nd day of May, 2007.

Respectfully Submitted,

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